STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
May 17, 2011

In the Matter of ALEXANDER, Minors.

No. 300484
Wayne Circuit Court
Family Division
LC No. 09-485406

Before: SAAD, P.J., and JANSEN and TALBOT, JJ.

PER CURIAM.

In this child protective proceeding, respondent-mother appeals the custody order that awarded respondent-father joint legal custody and physical custody of their minor child, D. Alexander, and terminated the wardship. Sole legal and physical custody of the minor child had previously been awarded to respondent-mother by an order entered in a paternity action between the respondents. Because the trial court's finding that the child had an established custodial environment with the court lacked specificity, we remand for further proceedings consistent with this opinion.[1]

Respondent-mother argues that it was premature for the trial court to address custody issues before she completed her court-ordered treatment plan. She contends that the Child Custody Act (CCA) and Juvenile Code were not "envisioned" to be used simultaneously. Despite respondent-mother's assertion, MCL 600.1023 specifically gives a judge presiding over a juvenile matter the "power and authority" to hear actions under the CCA, MCL 600.1021(3), so long as the judge abides by the procedural requirements incumbent upon him or her when hearing a custody matter under the CCA or conducting proceedings under the Juvenile Code. See MCR 3.204; MCR 3.205. Further, the CCA "applies to all circuit court child custody disputes and actions, whether original or incidental to other actions," MCL 722.26, and there is no authority to preclude a circuit court judge from determining custody pursuant to the CCA secondary to making determinations under the Juvenile Code. Therefore, respondent-father's motion for custody of his child was properly before the circuit court in this child protective proceeding. Moreover, the law clearly encourages returning a child home as soon as possible.

[1] Respondent-mother's four children were all taken into the court's temporary custody during the child protective proceeding. Respondent-father was the father of only the second child, D. Alexander, who is the only child at issue in this appeal.

MCR 3.976. Here, there was no way for the trial court to know exactly how long it would be before respondent-mother was prepared to assume custody of the child. Thus, it was not premature for the trial court to address custody issues before respondent-mother completed her court ordered treatment plan.

Respondent-mother also argues that the trial court erred in its determination regarding the established custodial environment. When a party seeks a change of custody, a trial court must make a factual determination about whether an established custodial environment exists in order to determine the moving party's burden of proof. *Foskett v Foskett*, 247 Mich App 1, 5; 634 NW2d 363 (2001).[2] If an established custodial environment exists with one parent and not the other, then the noncustodial parent bears the burden of persuasion and must show by clear and convincing evidence that a change in the custodial environment is in the child's best interests. *Berger v Berger*, 277 Mich App 700, 710; 747 NW2d 336 (2008). In circumstances in which an established custodial environment exists with both parents, see *Foskett*, 247 Mich App at 8, the party seeking to modify the custody arrangement bears the burden of rebutting the presumption in favor of the custodial environment established with the other parent. However, if no established custodial environment exists, the trial court may change custody or enter a custody order if a preponderance of the evidence establishes that the change serves the child's best interests. *Pierron v Pierron*, 282 Mich App 222, 245; 765 NW2d 345 (2009), aff'd 486 Mich 81 (2010).

Here, the trial court's findings regarding the established custodial environment were confusing and unclear. The trial court stated: "The juvenile [has] been in the custody of the court, not anybody else, has been placed with other people. . . . " The trial court specifically found the standard of proof to be clear and convincing evidence but did not explain its finding that the established custodial environment was with the court. Because the trial court's statement lacks specific factual findings, the court failed to properly determine the existence of a custodial environment. "Where a trial court fails to make a finding regarding the existence of a custodial environment, this Court will remand for a finding unless there is sufficient information in the record for this Court to make its own determination of the issue by de novo review." *Jack v Jack*, 239 Mich App 668, 670; 610 NW2d 231 (2000). Here, the child resided with respondent-mother before her removal and placement in protective care. After the child's removal from respondent-mother's home during the child protective proceeding, the child lived with respondent-father. Although the evidence demonstrates that respondent-father provided a home for the child for six months before filing a motion for custody, there is not enough evidence in the record to evaluate whether he provided an established physical and psychological environment. Thus, a remand is necessary for the trial court to determine whether a custodial environment existed.

[2] A child's custodial environment is established "if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort." MCL 722.27(1)(c). In making this determination, a trial court must also consider the "age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship . . . ." *Id.*

Once the trial court has determined the applicable burden, it can then determine whether a change in the established custodial environment is in the child's best interests consistent with the factors enumerated in MCL 722.23. To assist the trial court with this issue on remand, we find that, contrary to respondent-mother's argument on appeal, the trial court did not minimize the importance of the child's preference to live with her siblings under MCL 722.23(i). The child had expressed preferences toward each parent at different times, and the court, while finding the evidence "weak and confused," actually found that this factor favored respondent-mother.

Remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Kathleen Jansen
/s/ Michael J. Talbot